95-1735

Supreme Court, U.S.
FILED
APR 23 1996
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1995

MANVILLE PERSONAL INJURY TRUST,
Respondent,

v.

JAMES WALKER,
Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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A. Whether A Federal Magistrate May Punish Contempt By Entry Of A Substantial Money Judgment That Is Neither Certified To Or Reviewed By An Article III Judge.

B. Whether Failure To Attend A Federal Magistrate's Hearing To Determine Amount Of Contempt Sanctions Constitutes Implied Consent To The Magistrate's Jurisdiction, Or Waiver Of The Right To Challenge Validity Of The Order.

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IV. OPINIONS DELIVERED IN THIS PROCEEDING BY OTHER COURTS

A. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 71 F.3d 1319 (7th Cir. 1995); Exhibit B to Petitioner's Appendix

B. *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 855 F. Supp. 265 (C.D. Ill. 1994); Exhibit F to Petitioner's Appendix

C. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F.3d 755 (7th Cir. 1994); Exhibit G to Petitioner's Appendix

D. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 800 F. Supp. 643 (D.C. Ill. 1992); Exhibit H to Petitioner's Appendix

V. STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 12, 1995. The judgment affirmed an Illinois District Court's order directing the clerk of the District Court to disburse to respondent Manville Personal Injury Settlement Trust ("Manville Trust") $97,760.90 of a $100,000.00 bond deposited by petitioner James Walker ("Walker"). The disbursement was ordered to satisfy a "judgment" of contempt against Walker entered by a federal magistrate in New York. The disbursement order of the District Court concluded the contempt collection proceeding initiated by Manville Trust in Illinois. Walker appealed, and the Seventh Circuit affirmed the disbursement order in *In re Joint Eastern & Southern Districts Asbestos Litigation*, 71 F.3d 1319 (7th Cir. 1995), and denied Walker's petition for rehearing and suggestion for rehearing en banc on January 24, 1996. Walker seeks review by writ of certiorari pursuant to 28 U.S.C. § 1254, contending that the federal magistrate's contempt judgments were void.

VI. Constitutional and Statutory Provisions Involved

A. United States Constitution

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States;—between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

B. 28 United States Code §636

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART III. COURT OFFICERS AND EMPLOYEES

CHAPTER 43. UNITED STATES MAGISTRATES

28 USCS § 636 (1995)

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter [28 USCS § 631 et seq.] shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure [USCS FRCP] for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 [18 USCS § 3142] concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code [18 USCS § 3401], in conformity with and subject to the limitations of that section, and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title [28 USCS §§ 1 et seq.] and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts [USCS FRCP Rule 53(b)].

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) [28

USCS § 631(b)(1)] and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure [USCS FRCP]. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district

court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter [28 USCS §§ 631 et seq.], and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the

district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [28 USCS § 635].

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code [18 USCS § 4107]. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 [18 USCS § 4108] and the appointment of

counsel authorized by section 4109 of title 18, United States Code [18 USCS § 4109], and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 [5 USCS §§ 8331 et seq., 8401 et seq.] which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

VII. STATEMENT OF THE CASE

In 1982, Johns-Manville Corporation petitioned for reorganization under Chapter 11 of the Bankruptcy Code in the Southern District of New York. Its reorganization plan established the Manville Personal Injury Settlement Trust ("Manville Trust"), to pay full value for all asbestos related claims incurred by Manville. See *Kane v. Johns-Manville Corporation,* 843 F.2d 636 (2d Cir. 1988). Claimants were permitted to sue Manville Trust. On June 14, 1990, the McLean County Circuit Court in Illinois entered judgments in favor of certain plaintiffs and against Manville Trust in the consolidated cases of *Handley v. Manville Corporation Asbestos Disease Compensation Fund* (No. 80 L 93) and *Betts v. Manville Corporation Asbestos Disease Compensation Fund* (No. 79 L 147). Respondent James Walker ("Walker") represented the plaintiffs in both state court actions.

On July 20, 1990, Judge Jack Weinstein, United States District Court, Eastern District of New York, assumed supervisory responsibility over the execution of Manville's confirmed reorganization plan, along with Bankruptcy Judge Burton Lifland. *In re Joint Eastern and Southern Districts Asbestos Litigation,* 129 B.R. 710, 762 (E. and S.D.N.Y. 1991). On November, 23, 1990, Judges Weinstein and Lifland entered an injunction order purporting to restrain asbestos claimants from proceeding against Manville Trust in all jurisdictions, including state court actions, notwithstanding the rights granted in Manville's reorganization plan. *Findley v. Blinken*, 982 F.2d 721 (2d Cir. 1992). The injunction order was entered in a class action suit filed on November 19, 1990 in New York. Neither Walker, nor any of the judgment holders in the *Handley* and *Betts* actions, were named parties in the class action or served with any summons. They did not receive any notice of a request for relief until after the injunction was entered and never appeared in that action. *See,* Walker affidavit, part of the record on appeal to the Seventh Circuit, Exh. I, Petitioner's Appendix ("App."), paragraphs 5-10.

Nevertheless, on April 19, 1991, Judge Weinstein issued a Rule to Show Cause why Walker should not be held in contempt of court for initiating state court citation proceedings against one of Manville Trust's banks. Notice of this hearing in New York was served in Illinois on Walker less than 24 hours before it commenced, and Walker did not appear. Judge Weinstein held Walker in contempt on April 24, 1991. However, he did not punish him, nor did the subsequent written order state there should be punishment. Instead, the District Court referred the matter to:

> . . .the Honorable John L. Caden, United States Magistrate, to determine whether sanctions, *if any*, should be imposed against Walker and, if so, in what amount. The Magistrate has also been asked to determine, *inter alia*, whether further sanctions should be imposed if Walker fails to obey this Court's Order.
>
> App. at Exh. J-4 (Emphasis supplied).

This order was signed only by the Clerk of the Court and failed to state under what authority or section of the Magistrate's Act the District Court's oral referral was under. Magistrate Caden chose to punish Walker for contempt by entering default money judgments against him. The Magistrate's first order was dated May 13, 1991 and entered judgment for $47,168.50 in fees and $4,916.80 in costs. App. at Exh. J-7. This order was never certified to or subsequently acted on *or entered* by a District Court judge. The second order was entered by Magistrate Caden on June 10, 1991, imposing additional fees and costs of $18,504.00 and $4,065.71, respectively, and a fine of $7,000.00. App. at Exh. J-10. This order was also never certified to or subsequently acted on or entered by a District Court judge. Neither of the Magistrate orders were structured as a report or recommendation to a District Court judge.

The "judgment" certified by the Clerk of the District Court for the Eastern District of New York, and enforced by Manville

Trust in the proceedings below, attached the two Magistrate orders as exhibits. App. Exh. J-5 No orders signed by any District Court judge were attached, and the September 3, 1991 "Judgment on Decision by the Court" referred to Magistrate Caden's orders of May 13, 1991 and June 10, 1991 only. The record below indisputably establishes that the "judgment" of $81,655.00 is the product of a clerk's entry and certification of two orders entered by a federal magistrate. District Court Judge Weinstein expressed no opinion on whether Walker should be punished for contempt and never treated Magistrate Caden's orders as recommendations which he later adopted.

Walker did not appear before either the District Court or Magistrate Caden. His consent to magistrate jurisdiction was not requested, nor given. Walker Affidavit, App. at I, par. 11-14.

On October 21, 1991, Manville Trust registered the magistrate's "judgment" in the United States District Court for the Central District of Illinois by filing a certification of judgment from the Clerk of the United States District Court for the Eastern District of New York regarding a judgment entered September 3, 1991. Manville Trust began collection proceedings, including the issuance of garnishment summons and a citation to discover assets. Walker moved, pursuant to Fed.R.Civ.P. 60(b), for a determination that the registered foreign "judgment" was void. Walker requested that the supplementary proceeding be dismissed and the attempted collection quashed. Ultimately, on June 17, 1994, Judge Mills, District Court Judge for the Central District of Illinois, directed the Clerk to disburse to Manville Trust $97,760.90 of the $100,000.00 bond previously deposited by Walker. The remainder of the money was returned to Walker. *See, In re Joint Eastern & Southern Dist. Asbestos Litigation,* 855 F. Supp. 265 (C.D.Ill. 1994), Opinion, App. at F. Walker filed his notice of appeal from this order to the Seventh Circuit Court of Appeals on July 12, 1994, maintaining *inter alia* that absent consent, the Magistrate lacked the power to punish him for

contempt under the Magistrate's Act[1] and Article III of the Constitution.

On December 12, 1995, the Seventh Circuit affirmed the District Court's order requiring Walker to satisfy the Magistrate judgment. *See*, *In re Joint Eastern & Southern Districts Asbestos Litigation*, 71 F.3d 1319 (7th Cir. 1995), App. Exh. B. The panel's[2] decision incorrectly stated the money judgments were entered by the District Court, even though the actual orders prove the opposite:

> The first contempt, which is the basis of the enforcement action now before us, is the judgment of contempt ordered against Mr. Walker by the United States District Courts for the Southern and Eastern Districts of New York ("the Rendering Courts") on September 3, 1991. The Rendering Courts entered judgment on September 3, 1991, ordering a civil sanction of $81,655 plus interest against Mr. Walker, to be recovered by the Manville Personal Injury Settlement Trust ("Manville Trust").
>
> *Id.* at 1320

Thus, the contempt judgment sought to be enforced in this Court is the valid judgment of a district court judge, and there is no reason why the supersedeas bond posted by Mr. Walker cannot be applied in satisfaction of the judgment rendered in favor of the Manville Trust by the Eastern and Southern Districts of New York.

Id. at 1322

Although Walker's briefs stressed that the judgment was entered by the Magistrate only, the panel's mistake, or deliberate gloss over the actual author of the $81,655.00 contempt judg-

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[1]28 U.S.C. § 636

[2]Before Bauer and Ripple, Circuit Judges, and Reynolds, District Judge, sitting by designation. Opinion by Judge Ripple.

ment, enabled it to dispose of Walker's appeal on grounds of waiver. The panel held:

> In our view, an antecedent question, with respect to which we can perceive no ambiguity, affords an ample and principled basis upon which the judgment of the district court ought to be affirmed. As the Manville Trust notes, there can be no doubt that, although he had notice of the proceedings, Mr. Walker never challenged before the Rendering Courts the reference to the magistrate judge. Nor did he ever challenge in that court, or in the reviewing appellate court, the decision of the magistrate judge. Indeed, there was no challenge by Mr. Walker until the collection proceedings were filed in the Central District of Illinois. Even then, Mr. Walker never attempted to initiate review proceedings in the Rendering Courts, despite the district court's expressed preference, initially, for that route.
>
> Under these circumstances, we believe that it is clear that Mr. Walker has waived any objection he might have to the validity of the judgment of the Rendering Courts. Nor do we believe that it can be maintained that the issue ought to be confronted, despite Mr. Walker's obvious waiver, because the issue is "jurisdictional." In our view, such a label is inappropriate. Whatever the authority of the magistrate judge to enter the order in question in the absence of the consent of the parties, Mr. Walker's failure to object gave that consent. See *Peretz v. United States*, 501 U.S. 923, 932-33, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991). Nor do we believe that the absence of an Article III judicial officer in these circumstances can be characterized as the sort of "structural protection," id. at 937, that cannot be waived by the litigant. As Judge Easterbrook wrote for the court in an analogous situation, "which judicial officer presides . . . does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving the dispute. . . . We do not have a 'jurisdictional' problem of the kind that a tribunal must notice even though no party raised the problem. We have at most a mistaken interpretation of a law designating which judicial officer shall preside over the proceedings." *United*

States v. Wey, 895 F.2d 429, 431 (7th Cir.), cert. denied, 497 U.S. 1029 (1990).

Id. at 1323.

Walker's petition for rehearing and suggestion for rehearing en banc was denied on January 24, 1996. App. at Exh. A.

VIII. REASONS FOR THE WRIT

A. A Federal Magistrate May Not Punish Contempt By Entry Of A Substantial Money Judgment That Is Neither Certified To Or Reviewed By An Article III Judge.

Both this Court's opinion in *Peretz v. United States*, 501 U.S. 923 (1991) and the decision in *United States v. Wey*, 895 F.2d 429 (7th Cir. 1990) dealt with the *propriety* of a District Court *reference* to a Magistrate under the *"additional duties"* clause contained in §636(b) of the United States Magistrate's Act.[3] It is critical to those decisions that the Magistrates did not enter any judgment against the defendants, but merely presided over jury selection. *See, Peretz*, 501 U.S. at 925: (The Magistrate conducted voir dire of the jury, which defendant's counsel affirmatively consented to, but the District Court presided over the actual trial.), and *Wey*, at 431: ("Which judicial officer presides *during jury selection* does not affect the court's subject matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving this dispute. *The judgment (that is, the sentence) of the district court concerns a federal crime and is binding.*")[4] In contrast, this case deals with the *power* of a federal

[3]28 U.S.C. § 636(b)(3).

[4]The italics reflect portions of the *Wey* opinion that were left out from the Seventh Circuit's quote of that decision to support its conclusion that the errors raised in Walker's appeal were not jurisdictional. 71 F.3d 1319, at 1323. When the italics are added back in and the quote is read unaltered, it is clear that Judge Easterbrook was referring to a Magistrate's power to preside over jury selection when a party consented, *as long as the District Court enters the final judgment.* The panel's surgery on Easterbrook's comment in *Wey* completely changes its meaning.

magistrate to enter a final, substantial money judgment punishing contempt, and whether such an order must be set aside as void for lack of subject matter jurisdiction.

Neither *Peretz* nor *Wey* have anything to do with the principle raised, and endangered, by the panel's ruling in this case. They do not involve final orders of a Magistrate. In each of those cases, the District Court referred voir dire to the Magistrate under § 636(b)(3) of the Magistrate Act, and the District Court later entered final judgments. Here, it was never stated what section District Court Judge Weinstein relied on in referring contempt sanctions to Magistrate Caden, but it cannot possibly involve § 636(b)(3), as all orders under that section must be finally entered by a District Court. *Rajaratnam v. Moyer*, 47 F.3d 922, 924, and n.6 (7th Cir. 1995). Since Magistrate Caden's orders were not certified to the District Court, they are not validated under § 636(b)(3).

Moreover, no decisions support delegating contempt punishment to Magistrates under any section of 636(a) or (b). Indeed, those that involve powers similar to contempt sanctions construe these sections narrowly. The Seventh Circuit held a Magistrate could not enter an independent, final order of Rule 11 sanctions under any subsection of 636(a) or (b). *Alpern v. Lieb*, 38 F.3d 933, 934-935 (7th Cir. 1994). *Balachandran v. Moyer*, 47 F.3d 922 (7th Cir. 1995) also applied *Alpern* to a Magistrate's order denying an award of attorneys' fees. In that decision the Seventh Circuit determined that applications for attorneys' fees could not be independently decided by a Magistrate under the 636(b)(1) pretrial matters section or the 636(b)(3) additional duties clause. *Id.* at 923-924. *See* also, *Olympia Hotels Corporation et al v. Johnson Wax Development Corp. et al*, 908 F.2d 1363 (7th Cir. 1990)(additional duties section does not authorize Magistrate to conduct voir dire in a civil trial).

Certainly, Magistrate Caden's final orders were not authorized under § 636(e)[5] of the United States Magistrate's Act. That section does not permit a magistrate to punish contempt even when the contumacious conduct occurs before the Magistrate. In such circumstances, the Magistrate can only certify the facts of the incident to the District Court. Until the decision in this case, every Circuit Court of Appeals held that § 636(e) prohibited Magistrates from entering final judgments punishing contempt. *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1044 (7th Cir. 1984) ("[U]nder no aspect of the Magistrate Act can a magistrate punish for contempt."); *United States v. Ritte*, 558 F.2d 926, 927 (9th Cir. 1977); *Proctor v. The State Government of North Carolina*, 830 F.2d 514 (4th Cir. 1987); *Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888 (3rd Cir. 1992) (Magistrate not authorized to conduct a contempt hearing on a rule to show cause and District Court must conduct a de novo "hearing" as opposed to a de novo "determination"); *Bennett v. General Caster Service et al*, 976 F.2d 995, 998 n.7, (6th Cir. 1992) ("We note that Congress specifically withheld from magistrate judges jurisdiction over contempt proceedings. See 28 U.S.C. § 636(e)."); *United States v. Cargo*, 783 F.2d 507, 509 (5th Cir. 1986)("Under 28 U.S.C. § 636(e)(5)(1982), a magistrate must certify to the district court the facts surrounding the contempt charge.").[6]

The conflict created by the decision in this case and the remaining Circuits is dramatic. For instance, in *Taberer v. Armstrong*

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[5]*See*, page xi, herein.

[6]*See* also *FDIC v. Legrand*, 43 F.3d 163 (5th Cir. 1995) where a motion for contempt for failure to turn over tax returns was referred under § 636(b)(3), but only for a report and recommendation to the District Court. While the circuits disagree over the scope of § 636(b) and whether § 636(e) permits any delegation of contempt matters under § 636(b), that question need not be resolved here as § 636(b) requires the District Judge to enter the final order. Since no District Court in these proceedings entered any order assessing Walker a fine for contempt, § 636(b) cannot be invoked. The authority for Magistrate Caden's final orders must come from somewhere else, such as § 636(c).

World Industries, Inc., 954 F.2d 888 (3rd Cir. 1992), the Third Circuit held that whereas matters under § 636(b)(1)(C) require the District Judge to make a de novo *determination*, § 636(e) requires the District Judge to conduct a de novo *hearing* regarding contempt matters. In *United States v. Raddatz*, 447 U.S. 667 (1980), this Court distinguished a de novo determination from a de novo hearing. A de novo determination requires the District Judge to "consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate." 447 U.S. at 675. In contrast, a de novo hearing entails a new proceeding at which the decision is based solely on the evidence freshly presented at the new proceeding. *Id.* at 673-676.

If contempt is involved, the Third Circuit does not permit a District Court to rely on the record before the Magistrate. The District Court Judge must create its own record by holding a new hearing. However, the Seventh Circuit has now decided that a Magistrate may punish contempt on his own, by entering a substantial fine, and the District Court's failure to review and/or adopt the judgment, much less hold a new hearing, has no bearing on the enforceability of the judgment.

The only section of the Magistrate's Act which could conceivably legitimize the judgment enforced in this case is § 636(c)[7], since it normally permits a Magistrate to enter a final and appealable judgment *if all parties expressly consent. New York Chinese TV Programs, Inc. vs. U.E. Enterprises, Inc.*, 996 F.2d 21, 25 (2d Cir. 1993); *Stanley v. Amoco Oil Co.*, 965 F.2d 203, 204 (7th Cir. 1992) ("in the absence of consent, review of a magistrate judge's decision lies in the district court"); *Colorado Bldg. & Constr. Trades Council v. B.B. Andersen Constr. Co.*, 879 F.2d 809, 811 (10th Cir. 1989)(magistrate judge not authorized to render final

[7]*See*, p. ix herein.

decisions under 28 U.S.C. § 1291 absent both designation by District Court and consent of parties under 28 U.S.C. § 636(c)).

However, § 636(e)'s specific restrictions on a Magistrate's contempt powers, raise substantial doubts as to whether Congress intended § 636(c) to authorize Magistrates to enter final contempt judgments, even with consent.[8] Assuming the record below could establish consent, the Seventh Circuit's decision in this case also conflicts with the Fourth Circuit in *Proctor v. The State Government of North Carolina*, 830 F.2d 514 (4th Cir. 1987). In *Proctor*, all parties consented to the trial of their case before a Magistrate under § 636(c). Upon finding that a consent order was violated, the Magistrate, pursuant to § 636(e), certified the facts to the District Court, and the District Court entered a judgment of civil contempt. On appeal, the Fourth Circuit vacated the judgment, holding that the District Court applied the wrong standard in considering the facts certified to him by the Magistrate. It was error to apply the standard of review under § 636(c), because § 636(e) ". . . provides a different review procedure for contempts . . ." *Id.* at 517. Notwithstanding the consent under § 636(c), the Magistrate was still obliged to certify facts to the District Court, and the District Court was not bound by the record developed before the Magistrate or his findings. *Id.*

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[8]There is only one reported case holding that the parties' consent to try a case before a Magistrate encompasses civil contempt matters. *Miami Valley Carpenters District Council Pension Fund et al v. Scheckelhoff*, 123 F.R.D. 263 (S.D. Ohio 1988). This decision was entered by a Magistrate and has not been followed in any other reported cases. Both Illinois and New York Magistrates believe § 636(e) generally prohibits them from issuing final orders regarding contempt matters, notwithstanding § 636(c). *See, NLFC, Inc. v. Devcom Mid America, Inc.*, 1994 U.S. Dist. LEXIS 6245; *Bank Hapoalim, v. American Home Assurance Company et al*, 1993 U.S.Dist. LEXIS 15349, note 1; *See also, Stotts v. Quinlan*, 139 F.R.D. 321 (E.D. N.C. 1991); *Cook v. Rockwell International Corporation et al*, 907 F. Supp 1460 (Dist. Ct. Colo. 1995); *In re Kitterman*, 696 F.Supp. 1366 (Dist. Ct. Nev. 1988), and *Proctor v. The State Government of North Carolina*, 830 F.2d 514 (4th Cir. 1987).

Without addressing the Fourth Circuit's decision in *Proctor*, or the Third Circuit's holding in *Taberer*, the Seventh Circuit empowered Magistrates to independently enter final contempt judgments and created a conflict with at least two other Circuits regarding the scope of § 636(e).

B. Failure To Attend A Federal Magistrate's Hearing To Determine Amount Of Contempt Sanctions Is Not Implied Consent To The Magistrate's Jurisdiction, Or Waiver Of The Right To Challenge Validity Of The Order.

Additionally, the panel's holding that Walker "consented" to the Magistrate's jurisdiction because he failed to travel across the country to object, is contrary to the standard applied in consensual proceedings under § 636(c). The panel stated: "Whatever the authority of the magistrate judge to enter the order in question in the absence of the consent of the parties, Mr. Walker's failure to object gave that consent." 71 F.3d at 1323. But for this case, the Circuits appear unanimous that "consent" under § 636(c) must be expressly stated on the record and cannot be inferred from silence or conduct. *Fowler v. Jones, et al.*, 899 F.2d 1088, 1092-1093 (11th Cir. 1990)(waiver argument rejected; consent to magistrate must be express, ". . . the waiver approach does violence to Congress' specification in § (c) that trial before a magistrate must be predicated upon express consent." . . . ". . . the fact that Mr. Fowler failed to object to the arrangement set forth by the magistrate is no substitute for the express consent required . . ." *Id.* at 1092.); *Caprera et al vs. Jacobs*, 790 F.2d 442, 445(5th Cir. 1986) (consent must be explicit, cannot be inferred from conduct; consent is jurisdictional and may not be waived by failure to raise at an earlier stage; FRCP 60(b) motion granted); *New York Chinese TV Programs, Inc. vs. U.E. Enterprises, Inc. et al.*, 966 F.2d 21, 24-25 (2d Cir. 1993) (consent must be clear and express, voluntary, and in writing); *EEOC v. West Louisiana Health Services, Inc.*, 959 F.2d 1277 (5th Cir. 1992)(only after

judgment entered against intervening party by Magistrate, did that party object to jurisdiction for lack of consent; court vacated judgment, holding party's silence did not constitute a waiver, and her lack of express consent on the record destroyed jurisdiction); *Adams vs. Heckler*, 794 F.2d 303 (7th Cir. 1986); *Geaney et al vs. Carlson et al*, 776 F.2d 140 (7th Cir. 1985)("Because of constitutional overtones, courts are reluctant to imply consent to the magistrate's authority from a party's conduct"); *Ambrose v. Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984)("no clear and unambiguous statement in the record indicating that the parties consented"); *Trufant v. Autocon, Inc.*, 729 F.2d 308, 309 (5th Cir. 1984)("consent must be explicit, and will not be casually inferred from the conduct of parties"); *Alaniz v. California Processors, Inc.*, 690 F.2d 717, 720 (9th Cir. 1982)("clear and unambiguous expression of consent is required.").

This Court's decision in *Peretz v. United States*, 501 U.S. 923 (1991) lends no support to the Seventh Circuit's radical concept that "consent" under § 636(c) may be implied or waived through conduct, or that a Magistrate's power to enter a final judgment punishing contempt is not "jurisdictional" in the sense that it can never be waived. First, *Peretz* never dealt with the power of a Magistrate to enter a final judgment, much less a contempt judgment. It did not involve the interpretation of "consent" under § 636(c), but instead dealt with the District Court's reference of jury selection proceedings to a Magistrate under § 636(b)(3)—the "additional duties" clause of the Act. At the time of the reference, this Court observed that ". . . the District Judge asked if there was any objection to picking the jury before a magistrate? . . . Petitioner's counsel responded: 'I would love the opportunity.' " Jury selection commenced and the Magistrate again asked if the clients consented; she was assured they had. *Id*. at 925. Significantly, the District Court Judge thereafter presided at the jury trial—not the Magistrate. No objection was raised regarding the Magistrate's supervision of voir dire until after Petitioner was

convicted. Petitioner objected to the Magistrate reference for the first time on appeal. *Id.* This Court held that Petitioner's objection to the reference was foreclosed because he affirmatively welcomed it at trial and his consent was express and on the record. In so holding, this Court carefully distinguished a party's consent to a Magistrate supervising jury selection, which remained under the District Court's close control, as opposed to a complete transfer of power to the Magistrate, as occurred in this case. *Id.* at 937. Although *Peretz* discussed the possibility of waiving rights which are not jurisdictional, or go to the power of a court, it did not reach that issue, since Petitioner was represented at the trial, expressly consented to the Magistrate reference, and the District Court presided over the trial instead of the Magistrate.

The Seventh Circuit stands alone in interpreting *Peretz* as mandating a party to travel to a foreign jurisdiction and object to a Magistrate's power to enter a *final* judgment, or waive the right to attack the judgment when registered for enforcement. No other Circuit has even applied *Peretz* to a situation requiring express consent under § 636(c) as opposed to § 636(b).[9] The Fifth Circuit in *Equal Employment Opportunity vs. West Louisiana*, 959 F.2d 1277, 1281-1282 (5th Cir. 1992) considered such an argument and ruled opposite of the Seventh Circuit, holding that the matter

[9]In *Clark v. Poulton*, 963 F.2d 1361 (10th Cir. 1992), the Tenth Circuit's opinion referred to *Peretz* and later stated the broad proposition that ". . . a magistrate judge's lack of statutory authority is not a jurisdictional defect, so any objection is waived if not raised." *Id.* at 1367. But, the facts of that case were limited to proceedings under § 636(b)—not § 636(c), and the District Court held a de novo review of the record and entered judgment. *Id.* at 1362. Nevertheless, such a broad statement may lead to further disagreement among the Circuits on whether, and in what instances, lack of statutory authority under the Magistrate's Act is procedural or jurisdictional and not subject to waiver. Petitioner submits that at least in the situation where a Magistrate's judgment is not reviewed or subsequently adopted by the District Court, the question of statutory authority is clearly jurisdictional. This is an easier proposition than the status of a Magistrate's authority if the District Court Judge subsequently enters the judgment that is enforced.

of a party's consent to a Magistrate's jurisdiction is not a "procedural" question that can be waived, but is jurisdictional and may be raised at any time. The Fifth Circuit noted specifically that *Peretz* did not control:

> In *Peretz v. United States*, 115 L.Ed. 2d 808, 111 S. Ct. 2661, 2667 (1991), the Court permitted the magistrate to preside over jury selection where the defendant's counsel, "rather than objecting to the Magistrate's role, affirmatively welcomed it." We note that both of those cases refer to reference under section 636(b), whose language, unlike that of section 636(c), does not explicitly require the parties' consent. Nothing in those opinions indicates that the Court would conclude that failure to obtain the parties' explicit consent to reference to the magistrate for trial and entry of judgment under section 636(c) is a procedural error subject to waiver.
>
> 959 F.2d at 1282, note 4.

In *Henry v. Tri-Services, et al*, 33 F.3d 931 (8th Cir. 1994) the Eighth Circuit vacated a Magistrate's judgment of $1,200,000 in damages against all the defendants because a foreign corporation had not appeared and never consented to jurisdiction under § 636(c). The Court held that the record contained no clear statement that the foreign corporation ratified or consented to trial before the Magistrate, so notwithstanding the consent of the other defendants, there was no final order to appeal to the Court of Appeals. The Seventh Circuit turns this principle upside down. It holds in this case that Walker's failure to appeal the Magistrate's order constitutes a waiver to attack its validity. 71 F.2d 1322. This truly is absurd, since every Circuit, including the Seventh, previously recognized that a Magistrate's order is not appealable unless there is express consent that the Magistrate enter a final judgment. *See*, cases cited on p. 9, *infra*.

The Third Circuit's opinion in *Virgin Islands v. Raymond Williams*, 892 F.2d 305 (3rd Cir. 1989), approved by this Court in *Peretz*, acknowledged that the issue of consent is jurisdictional

and not subject to waiver, *even when references under § 636(b) are involved.* "We find little difficulty in concluding that the claim advanced by Williams is jurisdictional in nature, and thus is immunized from the general rule of waiver." *Id.* at 309. This Court also recognizes that "... a challenge to a court's power to adjudicate ... may be raised at any time." *International Longshoremen's Association AFL-CIO vs. Davis,* 476 U.S. 380, 381-382 (1986).

Consequently, Walker could challenge the enforcement of Magistrate Caden's judgment in Illinois pursuant to Federal Rule of Civil Procedure 60(b). Until now, it was established in the Seventh Circuit that the subject matter jurisdiction of the rendering court could be challenged under FRCP 60(b). *United States of America v. Indoor Cultivation Equipment et al,* 55 F.3d 1311 (7th Cir. 1995); *Griffith et al v. Sealtite Corporation,* 903 F.2d 495 (7th Cir. 1990). The Seventh Circuit's new rule collides with these decisions, the cases from other Circuits discussed above, and the Second Circuit, where Magistrate Caden's judgment was entered. *See, Collins v. Foreman,* 729 F.2d 108, 111 (2d Cir. 1984), where the court held that a rule 60(b)(4) motion may be brought at any time to collaterally attack a Magistrate's jurisdiction.

C. Constitutional Implications

The extreme position staked out by the Seventh Circuit must be reeled in by this Court. If § 636 authorizes Magistrates to enter final judgments punishing contempt, at least without explicit consent, then § 636 is unconstitutional under Article III. Setting aside the contempt prohibition in § 636(e), the delegation of final decision making authority to a Magistrate must rest on the requirement of explicit and express consent of all the parties pursuant to § 636(c). The voluntary, express consent requirement is recognized as the linchpin of § 636(c)'s constitutionality and a critical limitation on the expanded jurisdiction of Magistrates. *Gomez v. United States,* 490 U.S. 858, 870 (1989); *Geras v. Lafayette Display Fixtures, Inc.,* 742 F.2d 1037 (7th Cir. 1984); *Lehman*

Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313 (8th Cir. 1984), cert. den., 469 U.S. 1158; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984), cert. den., 469 U.S. 824.

The Seventh Circuit's equivocation of express consent under § 636(c) with a party's absence cannot pass constitutional muster. Up until this decision, the Seventh Circuit acknowledged that concern. In *Mark I. Inc. v. Gruber*, 38 F.3d 369 (7th Cir. 1994) Judge Easterbrook cautioned:

> Magistrate judges may conduct civil trials and enter final judgments, if all of the parties consent. 28 U.S.C. § 636(c); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984). Because this procedure entails a trial without judicial-independence guarantees of Article III, the litigants' consent must be voluntary and explicit. *Geaney v. Carlson*, 776 F.2d 140, 142 (7th Cir. 1985). Passive acquiescence in a decision made by others does not suffice. *Silberstein v. Silberstein*, 859 F.2d 40, 42 (7th Cir. 1988). Unlike some courts, e.g., *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*, 996 F.2d 21 (2d Cir. 1993), we do not insist that the consent be in writing, but it must be on the record and unequivocal. *King v. Ionization International, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987); *Lovelace v. Dall*, 820 F.2d 223, 226 (7th Cir. 1987). Unless each litigant expressly assents, the case must be tried by a district judge.
>
> 38 F.3d at 370.
>
> —for unless we overrule the cases holding that express assent on the record is essential, one's thoughts do not satisfy § 636(c). Consent to trial and final decision by a magistrate waives several constitutional rights. Waivers should be explicit and on the record.
>
> *Id.* at 371.

In his concurrence, Circuit Judge Wellford observed:

> This circuit has a very strict rule with respect to required consent of a party before a magistrate judge may enter a

> valid final judgment as to that party's interests. In *Jaliwala v. United States*, 945 F.2d 221 (7th Cir. 1991), this court went so far as to dismiss an appeal in a judgment exceeding $160,000,000 because an intervenor party had not consented orally or in writing to trial by the magistrate judge.
>
> *Id.* at 372.

IX. CONCLUSION

In light of the increasing use of Magistrates in our federal judicial system,[10] the boundaries of their power must be marked. The Circuits now disagree on whether a Magistrate can enter a final judgment punishing contempt, even with consent of the parties. The Circuits also disagree on whether the power of a Magistrate to enter a final judgment is jurisdictional or merely procedural. The decision of the Seventh Circuit in this case represents the extreme view that a Magistrate may enter a final judgment of contempt, even if a party does not consent on the record to the Magistrate's jurisdiction. Petitioner submits that such power is not authorized under the Magistrates' Act. If it is, the Magistrate's Act is an unconstitutional delegation of judicial power in violation of Article III. Under either alternative, the Seventh Circuit's decision in this case should not be permitted to stand. For the reasons stated herein, Petitioner requests that this Court grant the writ.

Respectfully submitted,
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[10] *Gomez v. United States*, 490 U.S. 858, 871 (1989).

No.

IN THE

Supreme Court of the United States

October Term, 1995

MANVILLE PERSONAL INJURY TRUST,

Respondent,

v.

JAMES WALKER,

Petitioner.

Appendix to
Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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